IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 45

THE UNITED STATES, *Petitioner*,

v.

THE KANSAS FLOUR MILLS CORPORATION.

On Petition for Writ of Certiorari to the Court of Claims of the United States.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Claims was entered January 6, 1941 and is as yet unreported.

JURISDICTION.

The judgment of the Court of Claims was entered January 6, 1941. (R. 10) The petition for writ of certiorari was filed March 31, 1941. Service was had and acknowledged by the respondent on April 14, 1941. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

The question presented is as follows:

> Has the United States, a purchaser of flour from the respondent at *a composite price*, the legal right under the express terms of the contract written by the Government and signed by both parties to recover from the respondent a part of the said *composite price* which the United States alleges was paid by it to respondent to use for payment of a processing tax imposed upon respondent under the provisions of the Agricultural Adjustment Act which, *although not mentioned in the contract*, was later declared unconstitutional, thus relieving respondent of the tax?

STATEMENT.

Respondent is a corporation organized and existing under the laws of the State of Delaware with its principal office in Kansas City, Missouri and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers including the United States. (R. 6) The respondent sold to the United States under contracts dated May 12, June 27, July 31 and December 4, 1936, wheat flour and wheat bran for a total consideration of $23,288.11. (R. 6-7) The flour and bran were delivered and accepted by the United States and vouchers in the amount of $23,288.11 were forwarded to the General Accounting Office for payment. (R. 6-7) The payment of these vouchers was withheld by the Comptroller General and the amount credited by him against an alleged indebtedness of a larger amount on account of alleged overpayments made by the petitioner to the respondent under certain other contracts referred to hereinafter. (R. 6-7)

During the period from May, 1935 to January 6, 1936 respondent had sold to the United States under contract approximately 3,383,000 pounds of flour. The flour was sold to the United States at *a composite price* and an excerpt

from one of the contracts between the respondent and the United States typical of the price provision contained in all of the contracts of sale and in all the invoices issued to the United States by the respondent follows: (R. 7)

Item	Pounds (about)	Unit price (per pound)	Total contract price
Lb. Flour, wheat, in sacks, Type A	78,400	0.0323	$2,532.32

Each of the contracts contained the following provision: (R. 7)

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

The respondent delivered the flour under the contracts, the same was accepted by the United States and payment made therefor in accordance with the bid price. (R. 7) Along with other wheat processors the respondent had during the period from May, 1935 to January 6, 1936 applied for and obtained from the United States District Court an injunction prohibiting the Collector of Internal Revenue from the collection of any processing taxes from it during this period. (R. 8) The Secretary of Agriculture prior to May, 1935 in accordance with authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regula-

tions approved by the President, established the rate of tax on first domestic processing of wheat at 30 cents per bushel of wheat processed, and the conversion factor as applied to floor stocks of flour was fixed at .00704 cents per pound. (R. 8)

The petitioner has identified certain contracts entered into between it and the respondent during the period from May 1935 to January 6, 1936 and by multiplying the total number of pounds of flour provided for by the contracts by the conversion factor applicable to floor stocks, .00704, has arrived at an amount of the alleged indebtedness of the respondent to the United States amounting to $28,419.20. (R. 8) The amount for which judgment has been rendered of $23,288.11, which is admitted to be owing to the respondent, has been by the Comptroller General credited against the alleged indebtedness of the respondent to the United States in the amount of $28,419.20. (R. 8-9) On April 20, 1938 a petition was filed in the Court of Claims by the respondent to recover the $23,288.11 owing to it by the United States on account of flour delivered and accepted under contract subsequent to January 6, 1936 and which had by the Comptroller General been credited against the alleged indebtedness of the respondent to the United States in the amount of $28,419.20. (R. 8-9) The Court of Claims entered judgment in favor of the respondent in the amount of $23,288.11 on January 6, 1941. (R. 10)

SUMMARY OF ARGUMENT.

I

The question here presented has been carefully considered in numerous decisions rendered by Federal and State Courts and the opinions are unanimous in support of the decision of the Court of Claims. This Court has considered and denied petitions for certiorari.

II

The contract which constitutes the basis for the controversy is clear and unambiguous. It must be construed in

accordance with the express language contained therein, a thorough analysis of which has been made by this Court and by the court below.

III

It has long been established as a matter of law that a composite price cannot be disintegrated so as to identify the various elements of costs of which the tax constitutes a unit.

IV

Congress enacted Title III of the Revenue Act of 1936 establishing a formula to be used as a basis for the recovery by the United States of any escaped processing tax, in the event the processor was unjustly enriched, and an interpretation of the contract here under consideration as now advocated by the United States might seriously affect the collection of revenue and cause a large amount of unwarranted litigation.

ARGUMENT.

I.

The question here presented has been carefully considered in numerous decisions rendered by Federal and State Courts and the opinions are unanimous in support of the decision of the Court of Claims. This Court has considered and denied petitions for certiorari.

The so-called tax clause which is here under consideration is typical of those which were made a part of all contracts between vendees and processors in connection with the sale of products during the period within which the processing tax was effective. The actual wording of the clause appearing in the contracts differed even insofar as the Government was concerned, but the substance and effect thereof was the same. These different wordings were examined by the Court of Claims when it decided the case of *Ismert-Hincke Milling Company* v. *United States*, 90 Ct. Cls. 27. In this connection the Court stated after considering,

among others, the case of *Continental Baking Company* v. *Suckow Milling Co.*, 101 Fed. (2d) 337, (C. C. A. 7):

> "The opinion of the Court in the case above cited considered a large number of cases involving the question of the right of the purchaser to recover the amount of the tax under circumstances similar, or nearly similar, and held in effect that there could be no recovery where the tax was absorbed in the price and was not a separate item thereof."

Again the Court said:

> "While some verbal differences may be found in the terms of the contracts involved in the cases cited to support plaintiff's contentions, these differences do not affect the principle laid down therein or the rules which determine defendant's right to recover."

In most of the cases decided by the Courts in which this type of tax clause was involved it will be found that the provisions of the contract are set out in either the decision of the Court or the notes accompanying the same, either in substance or verbatim. For the sake of brevity these clauses considered by the various Courts are not set out in this brief.

In support of our petition in opposition to the granting of the writ of certiorari we respectfully call attention of the Court to the following decisions:

O'Connor-Bills, Inc. v. *Washburn Crosby Co.*, 20 F. Supp. 460, decided August 31, 1937, U. S. D. C., West. Div. West. Dis. of Mo.

Golding Bros. Co., Inc. v. *Dumaine*, 93 Fed. (2d) 162, (C. C. A. 1), decided December 8, 1937. The Court citing with approval the following:

Zinsmaster Baking Co. v. *Commander Milling Co.* (Minn.) 273 N. W. 673.

Cupples Co., Mfrs., v. *Mooney*, (Mo. App.) 25 S. W. (2d) 125.

Moore v. *Des Arts*, 1 N. Y. 359.

Kastner v. *Duffy-Mott Co.*, 125 Misc. 886, 213 N. Y. S. 128.

Christopher v. Wright & Co., Inc., 160 Misc. 23, 289 N. Y. S. 105.

Texas Company v. Harold, 219 Ala. 356, 153 So. 442, 92 A. L. R. 323.

Corey Jones, Inc. v. Texas Textile Mills, Inc., (5th Cir.) 87 Fed. (2d) 414.

Hitchcock & Co., Inc. v. T. S. Brown & Son Co., Inc., 56 App. D. C. 233, 12 Fed. (2d) 154.

Johnson v. Scott County Milling Company, 21 F. Supp. 847, decided November 28, 1937, U. S. D. C., East. Dist. of Mo.

Cohen v. Scott & Co., 95 Fed. (2d) 133, (C. C. A. 7), decided Feb. 18, 1938.

D. F. Johnson v. Igleheart Bros., Inc., 95 Fed. (2d) 4, (C. C. A. 7), decided February 11, 1938.

G. S. Johnson v. Sauer Milling Co., 84 Pac. (2d) 504, 149 Kan. 861, decided December 19, 1938.

Continental Baking Co. v. Nuckles Milling Company, 101 Fed. (2d) 337, (C. C. A. 7), decided January 7, 1939.

Ismert Hincke Milling Co. v. United States, 90 Ct. Cls. 27, decided November 6, 1939, Reh. denied Feb. 6, 1940.

Meaudridge Milling Co. v. Crown of Wheat, Inc., 105 Fed. (2d) 366, (C. C. A. 10), decided June 15, 1939.

United States v. Hogan & Cushing Co., 115 Fed. (2d) 849, (C. C. A. 9), decided November 30, 1940.

Of the above stated cases, petitions for writ of certiorari were considered by this Court and denied in the following:

Cohen v. Scott & Company, 95 Fed. (2d) 133 (C. C. A. 7, Cert. denied 304 U. S. 563.

D. F. Johnson v. Igleheart Bros. Inc., 95 Fed. (2) 4, C. C. A-7, Cert. denied 304 U. S. 585, Reh. denied Oct. 10, 1938.

Golding Bros. Co. Inc. et al. v. Dennison et al., 93 Fed. (2d) 162 C. C. A-1, Cert. denied 303 U. S. 660.

II.

The contract which constitutes the basis for the controversy is clear and unambiguous. It must be construed in accordance with the express language contained therein, a thorough analysis of which has been made by this Court and by the court below.

At the time the respondent and the United States entered into the contracts, here in controversy, both parties had been for approximately two years fully aware of the existence of the Agricultural Adjustment Act and knew that thereunder the power to establish the amount and measure of the tax was delegated by Congress to the Secretary of Agriculture and was subject to change by him if conditions warranted.

It is obvious from the clear language of the "up and down" clause that both parties were desirous of protecting themselves against a change in the processing taxes or other taxes imposed or changed by Congress after the date for the opening of the bids, and *before the delivery of the supplies provided in the particular contracts.* Neither party at the time of the signing of the contracts did or could have anticipated that the Agricultural Adjustment Act would be held to be unconstitutional by the Supreme Court of the United States, or what would happen with respect to other contracts which might be entered into after the fulfilment of the contracts then executed. If the United States could have anticipated such a happening, it no doubt would have provided against it by supplying in the contract appropriate language to cover the situation and would no doubt have required that the alleged tax be set out separately in the invoice which, no doubt, would have altered the amount of the bid-price.

Its failure to anticipate that situation cannot be corrected by reading into the contract language which clearly does not appear therein.

The contract was written by the Government and was submitted on its own printed form. The rule under the

circumstances requires strict construction and in case of any doubt same must be resolved against the maker of the contract, which in this case is the United States.

A brief analysis of the provisions of the contract here under consideration will serve to demonstrate conclusively that the United States is without right to recover thereunder.

(a) The first provision is:

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract."

It is plain that the above stated provision was made for the express protection of the vendee. In other words, both parties were aware of the existence of certain Federal taxes for which liability rested upon the vendor. It was incumbent upon the vendor to pay such taxes from the funds collected from the vendee or from other funds in its possession and no addition could be made to the prices fixed by the contract to provide for the payment of existing taxes.

(b) The second provision is:

> "If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture or sale of the supplies covered by this contract—"

The expression of the parties in the above wording is plain and unambiguous and sets forth the only exception or contingency recognized as possible or that was anticipated as in any way affecting the contract prices as fixed by the contracts. It was mutually recognized that Congress had the power to and might alter the taxes or other charges applicable to the supplies after the award of the contract and prior to its consummation.

"(c) Third, if changes or alteration in the taxes were made by the Congress between the date of award and the date of fulfilment of the contractual obligation the parties agreed:

> "and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Congress did not make any change in the taxes or other charges affecting the prices of the supplies furnished under the contract between the date of the award and the completion of the contract or at any other time. The petitioner received that for which it bargained and paid therefor the contract price. The contract having been fully discharged, there being no basis for a claim "of fraud or mutual mistake," there existed no further liability on the part of either party. As will be observed from the finding of fact of the court below, the prices were composite and no provision was made in the contract or by the parties otherwise to segregate them into individual elements so as to discover what part thereof, if any, represented a processing tax.

Finally, and of vital importance, the parties made no mention of and therefore it must be concluded that there was no intention to provide for any adjustment in case the Agricultural Adjustment Act was declared unconstitutional.

It is a matter of record that during the period from May, 1935 to January 6, 1936, familiarly known among processors as "the injunctive period," when the courts had ordered the impounding of funds with which to pay the tax pending the outcome of the litigation, numerous vendees attempted to intervene on the grounds that they had an interest in said funds but the courts refused to recognize such claimed right.

After January 6, 1936, when the Agricultural Adjustment Act was declared unconstitutional by the Supreme Court in the case of *United States* v. *Butler*, 297 U. S. 1, the vendees

renewed their efforts to establish a legal right to collect from the processors.

In one of the earlier cases decided, *O'Connor-Bills, Inc.* v. *Washburn Crosby Company*, 20 Fed. Supp. 460, the United States District Court for the Western District of Missouri, Western Division, in a well reasoned opinion passed upon a contract between a vendor and a vendee which, like the one here under consideration, was plain in its terms. The Court said:

> "This constituted an agreement between the parties as to the procedure to be followed if the tax should be decreased. The decrease was to be credited against the contract prices named in this contract.
>
> "Undoubtedly it was then believed that the decrease might be authorized before the execution of the contract and the payment of the amount due thereon by the plaintiffs. *The agreement did not provide for a refund if the contracts had been executed or fully carried out, nor neither did it provide for a credit or refund in the event the tax was held illegal.* The plaintiffs were not deceived nor over-reached in making the payment; therefore they lost all title and legal interest in the funds thus paid. Shell Oil Co. v. Miller, Inc. (C. C. A.) 53 F. (2nd) 74; Wourdack v. Becker, Collection (C. C. A.) 55 F. (2nd) 840; Lash's Products Co. v. U. S., 278 U. S. 175. (Italics ours)
>
> "The contracts of the parties specifically provided the procedure for giving the several plaintiffs the benefit of a decrease in the tax. At most, it would become a credit in their favor against the defendant, and clearly would constitute no other relation save that of debtor and creditor. The defendant, therefore, holds no specific funds in which the plaintiffs would have an interest and under their plain contracts with the defendant they are not entitled to an accounting."

The identical clause here under consideration has been submitted to this Court in the case of *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62 and *United States* v. *Cowden Manufacturing Co.*, decided by this Court January 13, 1941, (Reh. denied Feb. 10, 1941).

In the *Martin* case the company had sued for a refund of social security taxes which it had been required to pay after it had entered into a contract to furnish airplane parts. This Court decided that such taxes were not specifically mentioned in the contract and, therefore, could not be recovered.

The Cowden Manufacturing Company paid a tax on the cotton cloth which was used to manufacture mechanic's type suits. This Court denied the right of the company to recover from the Government under the identical contract provision because the contract stated that the taxes must be imposed upon the "supplies", interpreted by the Court to mean mechanic's suits, and not the cloth used in the making thereof. In the *Martin* and *Cowden* cases the Government advocated before this Court a strict construction of the contractual clause, whereas in this case the Government takes the opposite view, and would have the Court read into the contract provisions neither thought of nor present. The rule with respect to interpretation of a contract with respect to the maker thereof is well stated by the Court in *Sternberg v. Drainage District*, 44 Fed. (2d) 560, 562 (C. C. A. 8):

> "It is first to be observed that the instrument forming the basis of this controversy was prepared by the contractors and presented to the commissioner of the defendant. If the contract is ambiguous, the plaintiff is responsible for its ambiguity, and, under such circumstances, the contract should be construed most strongly against the party preparing it."

In *Northern Pacific Railroad Co. v. Twohy Bros. Company*, 95 Fed. (2d) 220 (C. C. A. 9), the Court said:

> "However, were the term 'work' still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed 'Form 109-A General Contract' which the contractor signed."

To the same effect see *Bankers Mortgage Company v. Dale*, 130 Kan. 372, and *Green v. Royal Neighbors of America*, 146 Kan. 571, where it is stated by the Court:

> "There is an elementary rule of law that where one party to a contract is privileged to set down in writing the terms at which another party is to give asset, and a controversy arises as to their meaning, the contract should be construed strictly against the writer and liberally toward the other party."

In the case of *D. V. Johnson* v. *Iglehart Bros., Inc., supra*, with respect to a contract similar to that here under consideration, the Court said:

> "It is urged upon us, however, that notwithstanding the want of express language to cover the situation presented, the court should construe the contracts as containing an implied promise to refund to the plaintiff that part of the purchase price which went to make up the processing tax. In other words, we are asked, by construction, to afford the plaintiff protection against a contingency other than that which the parties themselves provided."

After reviewing and citing specific language taken from several authorities upon the construction of the express provisions as a contract the Court concludes:

> "Other authorities could be quoted to the same effect. It seems clear to us that the law is well settled that where parties expressly contract, under what circumstances an obligation may arise with reference to a certain subject matter, where the same is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature. In the instant case, the alleged implied covenant, of course, is not contradictory to those expressly made, but it certainly is different and in addition thereto. There is no claim of fraud or mutual mistake; the parties were dealing at arms' length and so far as is shown, there was no effort or intention on the part of either to prevent the other from incorporating any provision necessary for the protection of the contracting parties. If the parties had desired or intended to provide for the contingency here presented, they could and, no doubt, would have done so. *Generallia Specialibus non Derogant.*"

Any proper interpretation of the contract under consideration must recognize that it contained no provision which contemplated the unconstitutionality of the Agricultural Adjustment Act or the refund to petitioner of any part of the sale price of the product. To hold otherwise would be to supply language which does not exist, is not implied and would not carry out the intention of the parties and which has been consistently refused by the Courts.

As is stated by the Court of Claims in the case of *Ismert-Hincke Milling Company* v. *United States*, *supra*:

> "It should be kept in mind in this connection that the contracts upon which suit was brought contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff."

In that case the Court had under consideration the identical contractual provision as applied to the same facts and circumstances as exist in this case.

III.

It has long been established as a matter of law that a composite price cannot be disintegrated so as to identify the various elements of costs of which the tax constitutes a unit.

It has been found as a fact by the Court of Claims (R. 7) that there was only one price stated by the petitioner to the purchaser of the flour and wheat bran. This was a composite price.

The courts had definitely decided prior to the existence of the Agricultural Adjustment Act, which provided for the processing tax, that where the price is billed to the purchas as a total sum, the purchaser can claim no interest therein on account of the existence of the tax. In order that the purchaser may have an interest in the tax paid by the seller the tax must have been billed to him as a separate item and

he must have put the purchaser in the specific funds used to pay the tax.

Treasury Regulations 47, Revenue Act 1924
Heckman & Co. v. *I. S. Dawes & Sons Co.*, 12 Fed. (2d) 154
Wayne County Produce Co. v. *Duffy-Mott Co.*, 244 N. Y. 351; 155 N. E. 669
Lash's Products Co. v. *U. S.*, 278 U. S. 175
Boyle Valve Co. v. *U. S.*, 69 Ct. Cl. 129; 38 Fed. (2d) 135
U. S. v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386.

The distinction as between a tax separately billed and a composite price which may or may not contain the unit of tax is clearly pointed out in the *Wayne County Product Co.* v. *Duffy-Mott Co.* case, *supra*, by Mr. Justice Cardozo, then Chief Justice of the Court of Appeals of New York. In that case the purchaser had contracted to pay a certain price for the goods plus a tax of 10 per cent. it was there said:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N. Y. 359. This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise."

It is also pertinent to point out the following statement made by Mr. Justice Holmes in the case of *Lash's Products Co.* v. *the United States*, *supra:*

> "The phrase, 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2nd) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation but that is all. • • •

> "* * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. * * *"

The long line of cases decided by both the Federal and State courts in 1937, 1938 and 1939 have cited the above cases with approval, as being well established law and have applied them to the "processing taxes" illegally levied under the Agricultural Adjustment Act, the principle being when the price is billed in a total sum and no segregation made as to the tax then the vendee pays the price solely to obtain the products even though the price may have been greater because of the existence of the illegal tax.

The courts have refused to permit any segregation of the price into component parts whether or not there existed between the parties contracts containing the "increase or decrease" clause which is here under consideration. It is obvious whether or not there were contracts in existence containing the "increase and decrease" clause that the parties never intended any adjustment in the price unless the Secretary of Agriculture had adjusted the rate of the tax during the period of the performance of the particular contracts. It is reasonable to assume that during the period when the injunctions against the collection of the illegal tax were effective, from May, 1935 to January 6, 1936, that the prices which the vendors were able to obtain from the vendees were lower than those obtained during the period when the illegal taxes were being paid, because of the uncertainty then existing as to the legal status of the tax. While the facts in the instant case are, perhaps, by the very nature of things, slightly different from the facts in some of the cases decided by the courts, yet the principle of law that the vendees had no legal interest in the total price of the product by reason of a clause in the contracts such as is here under consideration is definitely established.

In *Golding Bros Co., Inc.* v. *Dumaine*, 93 Fed. (2d) 162, (C. C. A. 1), the Court said:

> "It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him."

With respect to the rights of the vendee to recover where flour had been sold at a composite price, the Supreme Court of Mississippi has said in the case of *L. L. Mattingly, et al. v. G. B. R. Smith Milling Company*, 184 So. 635:

> "The record shows that all the flour was sold to appellants at a flat or total or composite stated price, per barrel, not at a certain price per barrel, plus the processing tax of $1.38. In so far as the tax may have been taken into consideration at all in fixing the sales price, it was indistinguishably incorporated into, and absorbed along with, all the other items of cost or expense which went to make up the total sales price per barrel; and it is now thoroughly well settled that when the tax item or any other item has been indistinguishably intermingled or absorbed in a total or composite stated price to be paid on delivery of the purchased article, the buyer is without remedy, though the annulment of the tax may increase the profit of the seller."

The Supreme Court of Kansas passing on the same situation in the case of *Johnson v. Sauer Milling Co.*, 84 Pac. (2d) 934, 148 Kan. 861, said:

> "In the case before us the contract was entered into on November 6, 1935, long after the processing tax became effective. The only price mentioned in the contract was a price in gross per barrel. Evidently that price included the ad valorem taxes, the cost of milling, selling, insurance, etc. The tax was measured not on the flour, but upon the wheat. The tax imposed was 30 cents per bushel of wheat of 60 pounds, computed and fixed at $1.38 per barrel of flour. It is clear the item of

the tax was absorbed in the total or composite price to be paid for flour sold.

"The contract did not provide for a credit or refund to the buyer in the event the tax was held illegal. This contingency was not in the contract. It is not contended there was fraud or mutual mistake, and no valid reason has been suggested why the agreement should not be enforced as written."

The Court of Claims in the case of *Ismert-Hincke Milling Company* v. *The United States*, *supra*, after considering the various cases states as follows:

"Accordingly the Circuit Court of Appeals in the Continental Baking Co. case, supra, dismissed the action of the plaintiff stating, among other things, as a reason for its decision that—

" 'The contract does not contain any provision for the refund of any part of the purchase price in the event the processing tax should be annulled,'

"and that

" 'plaintiff did not pay two separate funds to the defendant, namely, a fund for the flour and fund for the tax, but on the contrary, * * * there was but one price named in each of the contracts.'

"It will be observed that the same condition existed in the case at bar."

To say that a part of the *composite* contract price represented a tax recoverable by the Government would be to upset the law which has been established for years. It would invalidate regulations of the Commissioner of Internal Revenue which have long had congressional approval and have been sustained by the Courts. The position of the Solicitor General here is contrary to that advocated heretofore.

Note the statement of this Court in *Lastis Products Company* v. *United States*, *supra*.

IV.

Congress enacted Title III of the Revenue Act of 1936 establishing a formula to be used as a basis for the recovery by the United States, of any escaped processing tax, in the event the processor was unjustly enriched, and an interpretation of the contract here under consideration as now advocated by the United States might seriously affect the collection of revenue and cause a large amount of unwarranted litigation.

Congress as a part of the Revenue Act of 1936, approved June 11, 1936, enacted Title III (U. S. C. A. Title 26, Sec. 700), which provided

> "Title III—Tax on Unjust Enrichment Sec. 501. Tax on Net Income From Certain Sources.
>
> "(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:
>
> "(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed."

In connection with the above, we respectfully call attention of the Court to a discussion of the legislative history of the above stated section of the 1936 law as recited in *Seidman's Legislative History of Federal Income Tax Laws*, 1938—1861, pages 266-269. We particularly call attention to the following discussion which appears on pages 267, 268:

> "Mr. Vinson of Kentucky. If he is in the red and does not make a net profit on the business, if he does not make any income on the transactions involved, there is no tax. If you multiply nothing by 80 percent, of course the tax is nothing.

"Mr. Harlan. Is the tax based on 80 percent of the unjust profits, or is it on the income?

"Mr. Vinson of Kentucky. It is the unjust profits counted in with his business. (p. 6093)

"Mr. Colden. Why should not the Government retax the whole amount instead of 80 percent?

* * *

"Mr. Houston. And 20 percent is ample to take care of all expenses—bookkeeping and all expenses incidental to the collection of the money?

"Mr. Cooper of Tennessee. We think so. In other words, what we hoped to accomplish was simply this: The ideal we had before us was that no man in this country should be enriched by one penny by reason of collecting this tax and passing it on to his customers and failing to pay it to the Government and at the same time no man should be caused to suffer a loss by reason of the processing taxes. (p. 6094)"

The processing tax was fixed by the Secretary of Agriculture on the basis of 30 cents per bushel of wheat processed. The processor was charged with payment of the tax. The tax was not imposed upon the manufactured product, nor was the purchaser of the product made responsible for payment of the tax. The amount of indebtedness which the United States claims to be due it in this case of $28,419.20 is computed by multiplying the number of barrels of flour purchased by the factor .00704. This is the factor which the Secretary of Agriculture fixed as applied to floor stocks and the floor stocks on hand when the processing tax was imposed upon wheat as a basic product July 9, 1933. *Treasury Decision 4391-(XII-2 CB 480)*, promulgated September 18, 1933, superceded in some respects by *Treasury Decision 4579-(XIV-2 CB 483)*. The alleged indebtedness computed by the Comptroller General is a mere mathematical conclusion without jurisdiction in fact or at law.

The respondent, as found in the facts by the Court of Claims, obtained an injunction against the Collector of Internal Revenue preventing the collection from it of processing tax for the period from May, 1935 to January 6, 1936. Congress has provided in Title III of the Revenue Act of

1936, that if by the application of the method set forth and approved by Congress it was found that the respondent has escaped any tax as the result of not paying the same to the Collector of Internal Revenue during the injunctive period, then the respondent must pay 80 per cent thereof to the Collector of Internal Revenue. It was within the knowledge of Congress that certain expenses must be borne by the respondent in connection with the administration of these funds. Therefore, as indicated it was the intent of Congress to exempt 20 per cent of this fund from taxation, or such portion thereof as might remain after expenses had been met. It was further the intent of Congress that if the respondent absorbed the tax which it did not pay to the Collector of Internal Revenue during the injunctive period, May 1935 to January 6, 1936, then it should not be required to pay any such tax and certainly the Government would not be entitled to recover from the respondent a tax which was not in the first place passed on to it.

If the respondent and those having like contracts with vendees were legally liable to reimburse the vendees on the basis as here claimed by the respondent, it would prevent the collection of revenue as intended by Congress under Title III of the Revenue Act of 1936, or in case settlements have been made it would open up large fields of litigation by way of claims for refund.

Title VII of the Revenue Act of 1936 was enacted by Congress as a companion to Title III of said Act. Title VII provided a formula for determining whether or not the processors were entitled to a refund of any of the tax illegally collected during the *pre-injunctive* period which was from July 9, 1933, the effective date of the Agricultural Adjustment Act, to the beginning of the injunctive period, which differed in individual cases, but which in this case was May 1, 1935.

Congress intended that the entire matter of the collection of tax escaped, if any, during the period from May 1, 1935 to January 6, 1936, would be taken care of by Title III of the Revenue Act of 1936 and any refund of tax which had

been paid from the effective date of the Agricultural Adjustment Act on wheat processed July 9, 1933 up to the injunctive period in this case, May 1, 1935, if any, would be determined under the provisions of Title VII of the Revenue Act of 1936. It was the intent of Congress that this entire matter be adjusted under Title II and Title VII of the Revenue Act of 1936 and that the same be administered by the Commissioner of Internal Revenue and not by the Comptroller General. It was the intent of Congress, as heretofore indicated, that no tax be escaped on account of the failure to pay to the Collector of Internal Revenue the processing tax during the injunctive period, but it was not the intent of Congress that a tax be collected on escaped processing tax by the Bureau of Internal Revenue and then collected by the Action of the Comptroller General such as has been taken in this case.

The Solicitor General in his application for a writ of certiorari states that certain cases are in litigation, other cases awaiting litigation, and that probably $2,000,000.00 is involved with respect to certain cases in the office of the Comptroller General. However, the Solicitor General does not inform the Court whether or not the Bureau of Internal Revenue has already collected or will collect 80 per cent of the amount involved as intended by Congress, or $1,600,000.00 of the $2,000,000.00 alleged to be involved. Neither has the Solicitor General informed the Court of the litigation which might ultimately result if such adjustments have been made or will be made by the Commissioner of Internal Revenue should this Court grant a writ of certiorari and reverse the opinion of the Court of Claims in this case.

CONCLUSION.

The decision of the Court of Claims is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for certiorari be denied.

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May, 1941.